

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH N. ATTANASIO	:	ORDER
	:	DTA NO. 818074
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Income Taxes under	:	
Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Years 1994 and 1995.	:	

Petitioner, Joseph N. Attanasio, 73 Highland Street, Concord, Massachusetts 01742, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 1994 and 1995.

A hearing was scheduled before Presiding Officer James Hoefer at the offices of the Division of Tax Appeals, Westchester District Office, 90 South Ridge Street, Rye Brook, New York on December 13, 2001 at 1:15 P.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request that the default determination be vacated. In addition, petitioner has filed an amended application to vacate default dated April 15, 2002. The Division of Taxation has not opposed petitioner's application.

Petitioner appeared *pro se*. The Division of Taxation ("the Division") appeared by Barbara G. Billet, Esq. (Mary Sauter).

Upon a review of the entire case file in this matter as well as the arguments presented that the default determination be vacated, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

FINDINGS OF FACT

1. On October 20, 2000, the Division of Tax Appeals received a petition from Joseph N. Attanasio protesting a Notice of Deficiency issued by the Division of Taxation which asserted a deficiency of personal income tax for the City and State of New York for the tax years 1994 and 1995.

2. The calendar clerk of the Division of Tax Appeals sent a Notice of Small Claims Hearing dated November 5, 2001 to petitioner and to the Division of Taxation advising them that a hearing had been scheduled for Thursday, December 13, 2001 at 1:15 P.M. in the Westchester District Office at 90 South Ridge Street, Rye Brook, New York 10573-2800.

3. The Office of Counsel of the Division of Taxation responded to the Notice of Hearing by a letter dated November 1, 2001 and requested that the hearing be adjourned until January 2002 due to the impact of the World Trade Center tragedy on the Division of Taxation's personnel and resources. A copy of this letter was sent to petitioner. By letter dated November 19, 2001, the calendar clerk responded to a telephone conversation with a member of the Office of Counsel. The calendar clerk acknowledged that the Division of Taxation had withdrawn its request for an adjournment of the hearing and that the hearing would go forward as scheduled. A copy of this letter was sent to petitioner, although petitioner denies receiving it.

4. On December 13, 2001, at 1:15 P.M., Presiding Officer James Hoefer commenced a hearing in the *Matter of Joseph Attanasio*. Petitioner did not appear at the hearing and a default was duly noted.

5. On January 17, 2002, Presiding Officer Hoefer issued a default determination against petitioner. The default determination was mailed to petitioner on that date by certified mail. The default determination was returned by the U.S. Postal Service to the Division of Tax Appeals on February 8, 2002 because the letter was unclaimed by petitioner. The unclaimed letter was mailed once again to petitioner by regular mail on February 13, 2002.

6. On March 4, 2002, petitioner filed an application to vacate the default determination. Petitioner asserted that the conflicting exchange of letters involved in the request for adjournment caused confusion for him and led him to reasonably believe that the hearing would be adjourned. On April 15, 2002, petitioner filed an amendment to his application to vacate default in which he set forth the merits of his case. Petitioner asserted that during the period at issue he was a nonresident of New York State and New York City as well as a nonresident of the United States. Petitioner asserted that none of his income was attributable to services performed in New York State and thus none of his compensation was taxable by New York State and New York City.

7. The Division of Taxation by its letter of March 15, 2002 submitted a copy of the calendar clerk's letter of November 19, 2001 but otherwise did not oppose petitioner's request to vacate the default.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, "In the event a party or the party's representative does not appear at a scheduled hearing and an adjournment has not been granted, the presiding officer shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear." (20 NYCRR 3000.13[d][2].) The rules further provide that: "Upon written application to the

supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case.” (20 NYCRR 3000.13[d][3].)

B. There is no doubt based upon the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the presiding officer correctly granted the Division’s motion for default pursuant to 20 NYCRR 3000.13(d)(2) (*see, Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995; *Matter of Morano’s Jewelers of Fifth Avenue*, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioner to show a valid excuse for not attending the hearing and to show that he had a meritorious case (20 NYCRR 3000.13[d][3]; *see also, Matter of Zavalla, supra; Matter of Morano’s Jewelers of Fifth Avenue, supra*).

C. Petitioner has established a valid excuse for his failure to appear at the hearing. It must be recognized that, as a *pro se* litigant, petitioner is not familiar with the scheduling procedures of the Division of Tax Appeals. It must also be recognized that the scheduling of this case involved some confusion, occurring as it did shortly after the World Trade Center tragedy. It is clear that petitioner could reasonably have been confused by the unusual exchange of correspondence in this matter. Accordingly, petitioner has met the first criterion to have the default order vacated.

D. Petitioner has also established a meritorious case. If petitioner is able to prove that which he has asserted in his petition and request to vacate default determination, he will be entitled to some measure of relief.

E. It is ordered that the request to vacate the default order be, and it is hereby, granted and the Default Determination issued January 17, 2002 is vacated. This matter will be rescheduled for hearing as soon as circumstances may permit.

DATED: Troy, New York
August 1, 2002

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE